

Forced Medication

Section 71-959(3) provides that a subject has a right to refuse medication except “following a hearing and order of a mental health board, such treatment medication as will substantially improve his or her mental illness.”

The foregoing provision, enacted in 2004, simply brought Nebraska’s statutes in line with U.S. Constitutional requirements as articulated by the U.S. Supreme Court in Mills v. Rogers, 457 U.S. 291 (1982) and Washington v. Harper, 494 U.S. 210 (1990). The Mills case involved the rights of an individual committed to treatment through a civil process similar to the Nebraska Mental Health Commitment Act. These two cases stand for the proposition that it is unconstitutional in our country to medicate someone against their will, without first providing them with a Due Process hearing on the issue of forced medication.

This proposition was more recently articulated in Sell v. U.S., 539 U.S. 166 (2003), a criminal case in which the defendant was found to be not competent to stand trial and a danger to himself and others. Mr. Sell refused to take medication to make him competent to stand trial on felony charges. The Court held that under the Constitution, the government may administer drugs to render an individual competent to stand trial, if a due process hearing is given and the state’s reasons are more compelling than the subject’s reasons for refusing. The Sell decision also sheds light on what issues an impartial hearing body such as the Mental Health Board should consider when weighing the issue of forced medication, including:

- whether the medication is medically appropriate
- whether any alternative treatments are likely to succeed
- the likelihood and severity of drug side effects
- the likelihood of long term impact on the patient’s health
- whether the medication is likely to produce significant improvements
- whether the refusal to take the drug puts the patient or others at risk.

Constitutional rights apply to all citizens of the US. Moreover, civilly committed patients have the same Constitutional protections as do criminal defendants. Mills stands for the proposition that civilly committed patients enjoy Due Process protections in this regard. The same considerations that were applied in Sell are also applicable to Mental Health Board hearings on forced medication decisions. Basic Due Process protections would include a right to notice of the hearing, the medication that the State wishes to administer and an opportunity to defend his or her refusal to take that particular medication.

Even though the Nebraska statutory provision, 71-959(3) was enacted in 2004, the US Constitutional law that underpins the statute goes back over 23 years.

It should be clear from the foregoing that an attempt by the Mental Health Board to include “boilerplate” language in a commitment order granting the blanket authority to force medicate without first addressing the issues covered in this memo will not pass constitutional scrutiny. The subject is entitled to a due process hearing on these issues before a forced medication order can be entered in order to be consistent with the statutory and constitutional scheme.